ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1316
[Consolidated with No. 16-1367]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

KING SOOPERS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE NO. 27-CA-129598

PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Dillon Companies, Inc., d/b/a King Soopers, Inc., a private company, is a wholly owned subsidiary of The Kroger Company, which has issued shares of stock to the public. No other publicly traded company owns more than 10% of the stock of The Kroger Company.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici: The parties, intervenors, or amici in this Court are:

Petitioner King Soopers, Inc. ("King Soopers" or "Petitioner")

Respondent National Labor Relations Board ("Board")

Ruling Under Review: The ruling under review is the Decision and Order of the Board entered on August 24, 2016, finding that King Soopers violated Sections 8(a)(1) and (3) of the Act, expanding the Act's remedies to include search-for-work and interim employment expenses regardless of an alleged discriminatee's interim earnings, adopting the ALJ's credibility determinations, permitting the GC to twice amend the Complaint, affirming the ALJ's revocation of King Soopers' subpoena, and failing to defer this matter for final and binding resolution by an arbitrator pursuant to the applicable grievance and arbitration procedure in the collective bargaining agreement. A true and correct copy of the Decision and Order was attached to King Soopers' Petition for Review, filed October 12, 2016.

Related Cases: This appeal has been consolidated with appeal number 16-1367.

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
Act	National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*
App.	Appendix to Brief
ALJ	Administrative Law Judge Amita Bama Tracy
CBA	Meat Collective Bargaining Agreement between King Soopers and the United Food and Commercial Workers International Union, Local 7 and which applied to Geaslin
Complaint	General Counsel's October 31, 2014 Complaint
Decision	National Labor Relations Board's August 24, 2016 Decision and Order
Exceptions	King Soopers' Exceptions and Brief in Support of Exceptions filed on November 19, 2015
ALJ Decision	Administrative Law Judge Amita Bama Tracy's October 22, 2015 Decision and Recommended Order
Geaslin	Charging Party, Wendy Geaslin
NLRB	National Labor Relations Board
Board	National Labor Relations Board
GC	The Board's General Counsel
King Soopers	King Soopers, Inc.
Petitioner	King Soopers, Inc.
Union	United Food and Commercial Workers International Union, Local 7

STATEMENT OF JURISDICTION

On September 9, 2016, King Soopers filed a Petition for Review from the Decision of the Board finding that King Soopers violated the Act entered on August 24, 2016, pursuant to 29 U.S.C. § 160(f). App. 1253. On October 25, 2016, the Board cross-applied for enforcement pursuant to 29 U.S.C. § 160(e). App. 1287. On October 26, 2016, the Court consolidated King Soopers' Petition with the GC's Cross appeal for enforcement. App. 1292. The Board's Decision is reported at 364 NLRB No. 93. This Court has jurisdiction under 29 U.S.C. §§ 160(e)-(f).

STATEMENT OF ISSUES PRESENTED

1. Whether the Board erred by finding (a) King Soopers engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act by interrogating, twice suspending, and terminating Charging Party; (b) King Soopers violated Section 8(a)(1) of the Act by interrogating Charging Party in March 2014; (c) King Soopers violated Sections 8(a)(3) and (1) of the Act by suspending Charging Party on May 9, 2014; (d) King Soopers violated Sections 8(a)(3) and (1) of the Act by suspending Charging Party on May 14, 2014; and (e) King Soopers violated Sections 8(a)(3) and (1) of the Act by terminating Charging Party on May 21, 2014.

2. Whether the Board erred by adopting the ALJ's credibility determinations.

3. Whether the Board erred in permitting the GC to amend the Complaint twice to add a request for an enhanced remedy and to add an interrogation claim.

4. Whether the Board erred in affirming the ALJ's revocation of King Soopers' subpoena, which sought information related to the GC's request for an enhanced remedy.

5. Whether the Board erred by not deferring this matter to arbitration for final and binding resolution by an arbitrator pursuant to the applicable grievance and arbitration procedure in the CBA.

6. Whether the Board erred by expanding the Act's remedies to include search-for-work and interim employment expenses regardless of an alleged discriminatee's interim earnings.

STATUTES AND REGULATIONS

29 U.S.C. § 160(c)

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . .

29 U.S.C. § 160(e)

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28 [United States Code . . . Upon the filing of such petition, the court shall . . . have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

29 U.S.C. § 160(f)

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)

of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 158(b)(1)(A)

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

STATEMENT OF THE CASE

This matter was heard by the ALJ on August 11-12, 2015. The GC and Geaslin contended King Soopers violated the Act by (1) interrogating Geaslin in March 2014 regarding Union activity, (2) suspending Geaslin on May 9, 2014 for refusing a work order, (3) suspending Geaslin on May 14, 2014 for engaging in inappropriate and aggressive behavior, and (4) terminating Geaslin's employment on May 21, 2014. On October 22, 2015, the ALJ found King Soopers violated the Act in the manner alleged by the GC.

On November 19, 2015, King Soopers filed Exceptions and a Brief in Support of Exceptions ("Exceptions Brief") to the ALJ's Decision. King Soopers' Exceptions challenged the ALJ's findings that it violated the Act, as well as several other substantive errors committed by the ALJ. On August 24, 2016, the Board issued its Decision affirming the ALJ's Decision and expanding the Act's remedies to permit search-for-work related expenses without regard for a discriminatee's search-for-work efforts. Because the Board's Decision is not supported by substantial evidence and departs from established precedent without reasoned justification, it must be set aside in its entirety.

SUMMARY OF ARGUMENT

The Board's Decision should be set aside. The Board failed to conduct a substantive review of the ALJ's Decision and consider the ALJ's errors. On most issues, the Board did not consider the legal issues raised in King Soopers' Exceptions, but instead rubber stamped the ALJ's Decision. Often, the Board relegated issues to conclusory sentences and footnotes; and, in some circumstances, the Board ignored the issues altogether. The Board expressed its disinterest in analyzing King Soopers' challenges to the ALJ's Decision in its opening sentence when it stated, "[t]he primary issue in this case is whether [it] should modify the current make-whole remedy . . . ." The Board viewed this case as a means to expand the Act's remedies, while disregarding the other important legal issues. The Board's blanket adoption of the ALJ's legal and factual findings cannot survive judicial scrutiny.

The Board's expansion of the Act's remedies must also be set aside because it departs from established precedent without a reasoned justification and exceeds the Board's remedial authority by giving employees a windfall.

STANDING

King Soopers, as an employer engaged in interstate commerce, was subject to the Board's jurisdiction to determine whether it engaged in unfair labor practices. Here, the Board concluded King Soopers violated the Act and directed it to offer reinstatement and back pay to Geaslin, as well as other equitable relief, including posting a notice and requiring that it "cease and desist" from alleged violations of the Act. The Board also expanded the Act's remedies to include search-for-work expenses without regard for a discriminatee's interim earnings, and it awarded those damages to Geaslin. King Soopers, therefore, is an aggrieved party within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f) and, accordingly, has standing to seek review of the Board's final order in this Court.

STATEMENT OF FACTS[2]

A. General Background

Geaslin worked at a Starbucks located within King Soopers as a Coffee Clerk. App. 47:25-48:1. The people working at that Starbucks are King Soopers' employees. App. 213:8-10. Geaslin was represented by the Union. App. 48:2-7.

Every King Soopers employee is required to provide customer service, regardless of his or her position at the store. App. 232:1-5. King Soopers refers to the initiative as "Customer First." App. 232:1-5. Geaslin testified that helping in other departments, including sacking groceries, is consistent with the Customer First initiative and King Soopers' values. App. 121:7-25.

B. Geaslin's May 9, 2014 Outburst

On May 9, 2014 – the Friday before Mother's Day – King Soopers was overflowing with customers in the front end near the check stands. App. 214:15-21; 254:24-255:4; 282:7-13. In an effort to get customers through the check stands, Theresa Pelo (Store Manager) used the store intercom to call associates for assistance from other parts of the store, including Starbucks. App. 255:22-25; 282:14-283:1. Pelo regularly requests help from other departments, and all of King Soopers' witnesses testified that they have helped check out customers in

[2] Citations in this Brief will be as follows: "App. ___" to indicate the Appendix page numbers, "__ ALJD __" to indicate the page and line numbers, respectively, of the ALJ's Decision, and "BDD __" to indicate the page of the Board's Decision.

Starbucks or sack groceries when the store is busy. App. 223:16-21; 224:12-16; 231:9-17; 257:6-15; 282:14-283:1.

Immediately following Pelo's intercom request, Geaslin removed her apron, left Starbucks, and began walking toward Pelo in the front end. App. 283:11-16. When Geaslin approached Pelo, Pelo thanked her for coming to help sack. App. 216:24-217:1; 255:22-256:1; 283:17-20. In response, Geaslin told Pelo "no," and said she was going to lunch. App. 283:21-22. Pelo reassured Geaslin she could take her lunch break, but she first needed to follow Pelo's instructions and help sack for 5-10 minutes. App. 283:22-284:6. Pelo also suggested that Geaslin file a grievance if she believed Pelo's request violated the CBA. App. 284:3-6. Geaslin refused Pelo's directive and declined to sack groceries. App. 228:18-229:2; 256:12-19.

Because their discussion was getting heated, Pelo, Geaslin, and Angelica Eastburn (Coffee Lead) went to the office to talk further. App. 285:12-15. During the conversation, Geaslin raised her voice, disrespected Pelo, and repeatedly refused Pelo's work order that Geaslin sack groceries. App. 221:12-222:4; 286:1-6. Even Geaslin admitted she was agitated during the meeting. App. 73:21-23. Because of Geaslin's inappropriate behavior, Pelo suspended Geaslin pending an

investigation.[3] App. 223:5-7; 286:25-287:5. King Soopers' Manager of Labor Relations recommended Pelo terminate Geaslin's employment, but Pelo wanted to give Geaslin another chance and opted not to discharge her at that time. App. 288:10-15; 303:8-17.

C. May 14, 2014 Meeting

On May 14, 2014, Pelo met with Geaslin and her then-Union Representative, Danny Craine. App. 239:2-9. The purpose of the meeting was to discuss the May 9, 2014 incident and for Pelo to stress to Geaslin the importance of following Pelo's instructions. App. 289:3-8. Pelo intended to give Geaslin a second chance for her behavior and had no intention of terminating or disciplining Geaslin at the May 14, 2014 meeting. App. 192:21-193:2.

Geaslin's conduct, however, remained inappropriate; Geaslin rolled her eyes, made faces, and argued with Pelo. App. 239:18-24; 240:3-24; 260:10-261:21; 289:9-17. Geaslin also made multiple threatening lunges at Pelo in which she clenched her hands at her side and bore her teeth, while she was red in the face and her body was shaking. *Id.* Geaslin also continued to challenge Pelo's authority and told Pelo she did not have to respect her. App. 241:4-10; 289:5-12.

[3] Upon being suspended, Geaslin continued to yell at and behave inappropriately toward Pelo, including by yelling "waahhh, waahhh, waahhh" in an area of the store in which other employees could hear her. App. 222:16-24; 287:7-10.

Pelo specifically asked Geaslin to stop her inappropriate behavior. App. 242:12-15; 290:1-4; 295:7-11. Geaslin persisted. App. 242:16-19.

Geaslin's behavior was so hostile and otherwise inappropriate that Craine (*her* union representative) removed her from the room to calm her down. App. 191:1-8; 192:6-8; 290:6-10. Because of Geaslin's behavior on May 14, 2014, she was suspended pending investigation until May 21, 2014. App. 290:14-17.

D. Geaslin's May 21, Discharge

As a result of Geaslin's behavior on May 14, 2014, Pelo decided to terminate Geaslin's employment. King Soopers regularly terminates employees who engage in similar behavior. App. 228:1-17; 296:5-16. Craine testified that employees who engage in insubordination are terminated and, as such, he expected Geaslin to be terminated during the May 14 meeting. App. 189:4-12. On May 21, 2014, Pelo met with Geaslin and Craine, and terminated Geaslin's employment. App. 292:2-8.

On May 22, 2014, the Union filed a grievance challenging Geaslin's discipline. App. 800 (Er. Ex. 4). After completing the grievance process, the Union's Executive Committee withdrew Geaslin's Grievance, and the Union's Executive Board affirmed the withdrawal.[4] App. 182:3-14; 183:1-16.

[4] The factual circumstances underlying the Board's other orders are discussed in the context of the specific issues below.

ARGUMENT

A. Standard of Review.

"A Board's decision will [] be set aside when it departs from established precedent without reasoned justification, *see, e.g., Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C. Cir. 1992), or when the Board's factual determinations are not supported by substantial evidence," *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 446 (D.C. Cir. 2004). The "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CitiSteel USA, Inc. v. N.L.R.B.*, 53 F.3d 350, 354 (D.C. Cir. 1995) (citations omitted); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Board is not free to ignore evidence or draw only those inferences that favor one party. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 378-79 (1998). On appeal, the court "review[s] the Board's application of the law to the facts for reasonableness." *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 96 (D.C. Cir. 2015).

B. The Court Owes the Board No Deference When the Board Provides No Reasoning.

In its Decision, the Board affirmed multiple determinations made by the ALJ without providing any supporting analysis, explanation, or reasoning. Although the Court's review is deferential, it "will not 'rubber-stamp NLRB decisions,' and [it will] "examine carefully both the Board's findings and its reasoning." *Consol.*

Commc'ns, Inc. v. NLRB, 837 F.3d 1, 7 (D.C. Cir. 2016) (quoting *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012)); *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006) ("This level of deference, though high, has limits, and we will not rubberstamp NLRB decisions. The Board must provide a reasoned explanation for its decisions.") (internal quotations and citations omitted). Merely "affirm[ing] the judge's conclusions" without providing any reasoning, as the Board did here, is insufficient. As this Court has declared, "a bare statement simply cannot survive judicial scrutiny." *Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 437 (D.C. Cir. 2012).

This Court has previously highlighted the importance of the Board clearly presenting its reasoning:

> [W]e accord deference to the Board's exercise of its authority. We cannot be deferential, however, where the Board fails to adequately explain its reasoning. The Supreme Court has held that when the Board so exercises the discretion given to it by Congress, it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it . . . . Without a clear presentation of the Board's reasoning, it is not possible for us to perform our assigned reviewing function and to discern the path taken by the Board in reaching its decision.

Point Park Univ. v. NLRB, 457 F.3d 42, 49-50 (D.C. Cir. 2006) (internal citations and quotations omitted).

It is not this Court's role to determine *why* the Board affirmed the ALJ's determinations; "'the duty to justify lies exclusively with the Board in the first

instance.'" *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1436-37 (D.C. Cir. 1989). In *United Food*, the Court remanded the case for further proceedings, noting the Board Members' "bare assertion that their outcome conforms to [precedent] stands naked before us, without any elaboration whatsoever." The Court expounded on the Board's lack of reasoning:

> As it stands, the reasoning that we have been able to identify is unenlightening on the question how the Board reached its conclusions. As we have stated in earlier cases, our insistence on well-articulated reasoning in Board opinions is only secondarily designed to accommodate the needs of courts seeking to discern irrationality. "Its primary purpose is to impose a discipline upon the agency itself, assuring that it has undergone a process of reasoned decision-making rather than haphazardly reached a result that could (on one or another basis of analysis) be sustained." *International Association of Bridge, Structural and Ornamental Iron Workers Local No. 111 v. NLRB*, 792 F.2d 241, 247 (D.C. Cir. 1986). Moreover, in reviewing the application of an agency's test to cases that come before it, we seek an assurance that the test is in fact guiding agency behavior, rather than merely serving as a cover for arbitrary and capricious decisionmaking. Without a fuller discussion of the critical facts, and absent a more explicit explanation of how these facts form the basis for the legal conclusions reached by the Board in this action, we have no assurance that such reasoned decisionmaking was present in the Board's disposition of this case.

Id. at 1439. As described below, the Board's failure to conduct any analysis of several issues requires that those matters be set aside.

C. The Board's Rubber Stamp of the ALJ's Credibility Determinations Cannot Survive Judicial Scrutiny.

By ignoring undisputed evidence and excluding probative evidence and testimony based solely on her personal opinions, the ALJ made numerous flawed credibility findings that resulted in erroneous legal conclusions. King Soopers allotted eight pages to describe those defective credibility determinations in great detail in its Exceptions Brief. App. 1008-1015 (Exceptions Brief at 4-11). The Board, however, essentially ignored King Soopers' analysis. Rather than analyzing the ALJ's credibility determinations in its Decision, the Board skirted the issue by inserting two sentences of boilerplate in a footnote. *See* App. 1213, n. 1 (BDD at p. 1, n. 1). As a result, there is no way to know whether the Board fulfilled its obligation to conduct the required reasoned analysis. *See United Food*, 880 F.2d at 1439, *supra*.

Had the Board engaged in the required process of "reasoned decision-making," it would have reversed many of the ALJ's credibility determinations. For example, the ALJ found Geaslin to be a credible witness and credited nearly all of her testimony. She based her determination on her opinion that Geaslin's trial testimony "was corroborated by her Board affidavit." App. 921, n. 6 (3 ALJD n. 6). Geaslin's Board affidavit, however, was not entered into evidence. Not only does that mean King Soopers is unable to challenge the ALJ's findings (because it does not have a copy of that unintroduced affidavit), but it means the ALJ could

not have reviewed the entire affidavit and, thus, her conclusion is pure speculation. *See Jackson Hosp. Corp. v. N.L.R.B.*, 647 F.3d 1137, 1142 (D.C. Cir. 2011) (granting the petition for review and concluding that "[t]he Board's theory is mere speculation without a jot of evidentiary support in the record.").

Furthermore, the ALJ's conclusion is demonstrably wrong. Indeed, the only instance in which Geaslin's affidavit was introduced was to *impeach* Geaslin's credibility.[5] App. 86:20-87:21; 88:15-89:17; 90:1-23. The ALJ, however, failed to recognize (much less, consider) the existence of those inconsistencies.

In contrast, the ALJ concluded she "cannot rely on most, if not all, of the testimony provided by [King Soopers' witnesses] Pelo, Panzarella, and Barbos." App. 932 at 11-19 (14 ALJD 11-19). Specifically, she discredited their eyewitness testimony regarding Geaslin's actions (lunging toward Pelo) during the May 14, 2014 meeting, despite all three witnesses being sequestered and their testimony being consistent. App. 927, n. 21 (9 ALJD n. 21); *see also* App. 239:18-24; 240:3-24; 260:10-261:21; 289:9-17. Instead, she credited Geaslin's self-serving testimony and relied on her own (the ALJ's) *personal opinion* that, had Geaslin really lunged at Pelo, the managers would have called security. App. 927, n. 21 (9 ALJD n. 21). As the court found in an analogous case, here, the ALJ "treated

[5] As described in King Soopers' Exceptions Brief, Geaslin was impeached with *four separate* substantive inconsistencies between her trial testimony and affidavit. App. 1010-1011, 1031, n. 23 (Exceptions Brief, pp. 6-7, 27, n. 23).

conflicting evidence here with an almost breathtaking lack of evenhandedness." *Sutter*, 687 F.3d at 437.

In *Sutter*, the court observed that an ALJ applied seemingly different standards to union and company witnesses when it came to credibility determinations, completely disregarding the company's witnesses "for the slightest of immaterial inconsistencies, while the union's witnesses survived even material contradictions." *Id.* at 437. Similarly, the ALJ disregarded Geaslin's multiple and substantive inconsistencies and discredited King Soopers' witnesses based on her own speculation and opinion as to how they should have behaved. Because a reasonable factfinder could not have reached the credibility determinations made by the ALJ, the Court should reverse those determinations. *See Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 377 (1998) ("This is an objective test, and there is no room within it for deference to an agency's eccentric view of what a reasonable factfinder *ought* to demand."). Moreover, because the Board's decision is founded on the ALJ's erroneous credibility determinations, the Court should set aside the entire Decision.

D. The Board Erred in Permitting the GC to Amend the Complaint.

The GC twice sought to amend the Complaint: once two business days before trial to expand her requested remedy and a second time after the close of her

case-in-chief to add an interrogation allegation. App. 204:13-16 & App. 754 (GC Ex. 1(ee)).

The ALJ approved both amendments at trial and affirmed the approvals in her Decision. App. 928-930 (ALJD at pp. 10-12). The Board simply rubber stamped the ALJ's conclusions without any scrutiny. App. 1213, n. 1 (BDD at p. 1, n. 1). The Board's failure to apply its own standard regarding complaint amendments alone warrants reversal of its Decision. *See W & M Properties of Conn., Inc. v. N.L.R.B.*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute.") (internal citation omitted).

Moreover, with regard to the GC's remedy amendment, the Board merely found in passing that King Soopers "had a full opportunity to litigate the issue." App. 1220 (BDD at p. 8). Such a conclusory statement is insufficient. Rather, the Board must relate some facts to the required law to support its conclusion, particularly because the ALJ did not evaluate the amendment factors on this point. *See United Food*, 880 F.2d at 1439 (requiring an explanation of the facts and how those facts form the basis for the Board's legal conclusions). Because it did not do so, the Board's Decision cannot satisfy judicial scrutiny.

i. The Board's approval of the GC's enhanced remedy amendment should be set aside.

The Board evaluates three factors when considering whether to permit an amendment: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for her delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006). The Board's conclusion that King Soopers had an opportunity to litigate the GC's amendment to the Complaint to add an enhanced remedy is not supported by substantial evidence.

Immediately upon notice of the GC's intent to amend the Complaint to add an enhanced remedy request, King Soopers issued a subpoena requesting information about the basis for such a remedy. App. 768 (GC Ex. 1(ii)). The ALJ, however, revoked the subpoena and prevented King Soopers from questioning Geaslin about her search-for-work efforts and the merits of the requested enhanced remedy.[6] App. 26:23-27:24. Because the ALJ halted King Soopers' discovery, it was unable to litigate the GC's requested amendment.

Not only was King Soopers precluded from fully litigating the issue, but King Soopers had absolutely no notice of the GC's intent to seek an enhanced remedy until just prior to trial. App. 1016-1018 (Exceptions Brief, pp. 12-14).

[6] The Board's revocation of King Soopers' subpoena also must be set aside. App. 1022-1024 (Exceptions Brief, pp. 18-20)

The GC also failed to offer a valid excuse for the delay. When questioned about the delay, the GC simply stated it was an "oversight." App. 18:25-19:1. The GC's carelessness is not a valid excuse. *See Essex Valley Visiting Nurses Ass'n & Health Professionals & Allied Employees, Local 5122*, 353 NLRB 1044, 1051 (2009) (rejecting drafting error excuse); *see also Consol. Printers, Inc.*, 305 NLRB 1061, 1064 (1992). Thus, the Board's approval of the GC's amendment to add an enhanced remedy is not supported by substantial evidence.

ii. The Board's approval of the GC's amendment to add an interrogation claim should be set aside.

As noted above, the Board adopted the ALJ's approval of the GC's mid-trial oral motion to amend the Complaint to add an interrogation claim in a two sentence footnote. App. 1213, n. 1 (BDD at p. 1, n. 1). The ALJ's conclusion is based on assumptions and disregards the trial evidence.

Prior to the GC's oral motion to amend, King Soopers was not aware it was defending against an interrogation claim. It should come as no surprise, then, that King Soopers did not question Geaslin about an interrogation claim. *See* App. 1020-1022 (Exceptions Brief, pp. 16-18). Even after King Soopers learned of the claim, it was left without an opportunity to question Geaslin regarding the claim because she had *left the trial venue* by that point. App. 159:8-19. Thus, King Soopers could not fully litigate the GC's interrogation claim. *See United Mine Workers of Am.*, 308 NLRB 1155, 1158 (1992) (finding the amendment issue

not fully litigated where respondent, despite ostensibly having an opportunity to cross-examine the GC's witnesses, had no reason to know such was necessary); *see Consol. Printers*, 305 N.L.R.B. 1061, 1064 (1992) ("[I]t may not be glibly assumed that respondent counsel's handling of respondent's case would have been unchanged had he been aware of the potential new allegations.").

The ALJ found that Geaslin's Amended Charge put King Soopers on notice it was defending against an interrogation claim. That finding is clearly erroneous. The law is settled that charge allegations alone do not provide notice that the GC intends to pursue those claims or that respondent should be prepared to defend the claims.[7] *See e.g., Texas Indus. v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964) ("[T]he charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him . . . this is the function of the complaint."); *Douds v. Longshoremen*, 241 F.2d 278, 283-284 (2d Cir. 1957).

Finally, the GC provided no explanation for the untimely amendment, despite being aware of the facts supporting the amendment since May 2014, more than a year before trial. *See* App. 1020 (Exceptions Brief, p. 16). The

[7] The ALJ's "presumption" that the interrogation claim was investigated is also not supported by the evidence. *See Jackson*, 647 F.3d at 1142 (granting the petition for review and concluding that "[t]he Board's theory is mere speculation without a jot of evidentiary support in the record."); *see also* App. 1019-1020 (Exceptions Brief, pp. 15-16).

requirements for amendment have not been satisfied, and the Board's Decision is not supported by substantial evidence.

E. The Board Departed from Established Precedent by Not Deferring This Matter to the Grievance and Arbitration Process.

Following her termination, Geaslin filed a grievance. App. 800 (Er. Ex. 4). After exhausting the steps of the grievance process, the Union concluded it could not prevail at arbitration and withdrew the grievance. App. 182:3-5; 186:2-11. Geaslin subsequently appealed the withdrawal decision to the full Executive Board, which affirmed the withdrawal. App. 182:13-14; 183:1-16. The Union was fully aware of Geaslin's Charge at the time of its withdrawal and considered the merits of Geaslin's allegations. *See* App. 1025, n. 19 (Exceptions Brief, p. 21, n. 19). According to Geaslin, the Executive Committee declined to pursue her grievance because she should have helped sack the groceries and then filed a grievance. App. 143:17-22; 146:5-9.

From the outset, King Soopers has requested that the Board defer this matter to the grievance and arbitration procedure in the CBA. Deferral is appropriate under *Alpha Beta*, 273 NLRB 1546 (1985), because the parties mutually resolved Geaslin's grievance.

Neither the ALJ nor the Board conducted an analysis regarding *Alpha Beta's* application.[8] The Board's failure to consider *Alpha Beta* alone requires reversal. "[I]f the Board fails to follow or misapplies its own standards in deciding whether to defer to a grievance settlement, the Board's decision will be set aside as an abuse of discretion." *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 446 (D.C. Cir. 2004). Indeed, "[a]llowing the Board to disregard its own deference policy, which has been reinforced by long-standing and consistent case precedent, would undermine the careful development of the [] standards of deference, discourage parties from relying on their own bargaining agreements and procedures, and significantly undermin[e] the value and efficacy of arbitration as an alternative to the judicial or administrative resolution of labor disputes." *American Freight System, Inc. v. N.L.R.B.*, 722 F.2d 828, 833 (D.C. Cir. 1983).

The evidence supports deferral under *Alpha Beta*. Pre-arbitration withdrawal of a grievance after an investigation, like grievance settlements, represents a consensual resolution of labor management disputes through the collective bargaining process. *See General Dynamics Corp.*, 271 NLRB 187 (1984) (deferring to the grievance and arbitration process when the employee pursued a grievance over two suspensions through four steps of the grievance

[8] Instead, the ALJ considered whether deferral was appropriate under *Collyer Insulated Wire*, 192 NLRB 837 (1971). App. 930-931 (ALJD at pp. 12-13). For the reasons set out in King Soopers' Exceptions, the ALJ's analysis fails. App. 1024-1027 (Exceptions Brief, pp. 20-23).

process but withdrew the grievance "without prejudice" prior to arbitration).[9] Where the Union withdraws the grievance after properly investigating the facts underlying the dispute, the grievance process has succeeded and the matter should be deferred. *See* App. 1024-1027 (Exceptions Brief, pp. 20-23).

The Board's refusal to defer to the parties' resolution of Geaslin's grievance is an effort to undermine the parties' collective bargaining process and achieve a result more to its liking. The Board's efforts must not be countenanced.

> [S]ince a union has broad discretion to alter or modify employees' "waiveable" rights through collective bargaining . . . we see no basis upon which the Board legitimately could intervene merely because the settlement reached by the union and the employer was not to the Board's liking.

Plumbers & Pipefitters Local Union No. 520 v. N.L.R.B., 955 F.2d 744, 756 (D.C. Cir. 1992) (internal citations omitted). King Soopers and the Union have a long and mature collective bargaining relationship in which they regularly resolve allegations that King Soopers discriminated against employees and violated the Act. App. 183:20-184:2; 314:3-15. As such, the parties in the best position to

[9] The ALJ's attempt to distinguish *General Dynamics* on the basis that charging party in that case withdrew the grievance fails. App. 931 at 3-5 (13 ALJD 3-5). The ALJ's analysis is a difference without a distinction because Geaslin granted the Union authority to waive her rights under the Act and determine how best to handle her grievance. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 707 n. 11 (1983). Thus, the Union's voluntary withdrawal of the grievance acts as a voluntary withdrawal by Geaslin. If Geaslin disagreed with this decision, her remedy was to file a duty of fair representation claim against the Union, not pursue a charge against King Soopers. *See* 29 U.S.C. § 158(b)(1)(A); *see also Vaca v. Sipes*, 386 U.S. 171 (1967).

evaluate Geaslin's conduct are King Soopers and the Union, not the GC or the Board. Because the Board failed to apply the proper legal standard and refused to defer this matter to King Soopers and the Union's resolution of Geaslin's Grievance, the Board's Decision must be set aside.

F. The Board's Finding that King Soopers Interrogated Geaslin Is Not Supported by Substantial Evidence.

The Board also failed to analyze the ALJ's conclusion that King Soopers interrogated Geaslin. Rather, the Board merely rubber stamped the ALJ's decision. App. 1213 (BDD at p. 1). The Board's failure to perform a meaningful review of the ALJ's conclusions requires that the Board's Decision on this point be set aside. *See United Food*, 880 F.2d at 1438.

Even assuming the Board's lackluster analysis is sufficient to meet its burden, the Board's Decision must still be set aside because it is not supported by substantial evidence.

i. Geaslin did not engage in protected concerted activity in March 2014.

Employees engage in concerted activity when bringing group complaints to management's attention. *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1199 (D.C. Cir. 2005). "The touchstone for concerted activity, then, must be some relationship between the individual employee's actions and fellow employees." *Int'l Transp. Serv., Inc. v. N.L.R.B.*, 449 F.3d 160, 166 (D.C. Cir. 2006). Indeed, for an employee to engage in concerted activity, there must be a direct link

between the actions of an individual employee and the actions or approval of her co-workers. *See Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987).

The GC's interrogation claim is based entirely on Geaslin's testimony that, at some point in March 2014, she alone complained to her Union Steward, Latrice Jackson, about syrups and other products not being prepared when she arrived to work, as well as her concern that she did not have enough time to complete her Starbucks duties and help display bakery products. App. 50:22-51:7; 53:1-4.

In her decision, the ALJ concluded Geaslin engaged in protected concerted activity in March "since she sought group action, even if her coworkers were not aware of it, to change working conditions." App. 933 at 30-31 (15 ALJD 30-31). The ALJ's conclusion is unsupported by any record evidence, much less *substantial* evidence.

Geaslin's March 2014 personal complaint to Jackson was not on behalf of any other employees. She *alone* complained to Jackson and objected to Assistant Store Manager Lisa Panzarella's assignment of work duties. App. 50:22-51:7. Geaslin's complaints about her work assignments and her objection to sampling bakery products are purely her own personal interests. No evidence was presented that other employees agreed with Geaslin's complaints or that Geaslin was

speaking on behalf of other employees when she complained.[10] Individual complaints regarding work assignments do not constitute concerted activity. *See Plumbers Local 412*, 328 NLRB 1079 (1999) (an employee speaking with other employees "to advise them of her [personal] dissatisfaction" does not convert activity into concerted activity).

Even the ALJ recognized that "[Geaslin's] coworkers were not aware of" her complaint. App. 933 at 30-31 (15 ALJD 30-31). There can be no group action if there is no relationship between Geaslin's complaint and her coworkers. *See Reynolds Elec., Inc. & Gabriel T. Rice*, 342 NLRB 156, 165 (2004) ("*Meyers* requires, nevertheless, a showing that the individual's actions, although taken alone, were preceded by the individual's interaction with other employees sharing a commonality of interest."); *Int'l Transp.*, 449 F.3d at 166, *supra*.

Nor did Geaslin engage in concerted activity simply because her complaints might have benefitted other employees. In *Prill*, the court found the employee did not engage in concerted activity, explaining as follows:

> Despite the fact that there might be a benefit to Prill's fellow employees from his actions, Prill acted alone when he complained to

[10] Nor is the ALJ's conclusion that Geaslin spoke on behalf of other employees because during her trial testimony she used terms such as "we" and "our" supported by substantial evidence. App. 933 at 26-29 (15 ALJD 26-29). The GC presented no evidence regarding the language Geaslin used when she spoke with Jackson in March 2014. Thus, the ALJ's assumption that Geaslin used the terms "we" and "our" during her complaint to Jackson is mere speculation and must be set aside. *See Jackson Hosp.*, 647 F.3d at 1142.

> his employer and the Tennessee state officials, and when he refused to tow the unsafe truck. Had Prill simply gotten together with his co-workers to complain about the violation of statutory safety provisions, he would have been protected from dismissal under the Board's current reading of Section 7, which requires that both the "mutual aid or protection" *and* the "concerted activity" prongs be satisfied.

Prill, 835 F.2d at 1485; s*ee Williams v. Watkins Motor Lines, Inc.*, 310 F.3d 1070, 1072 (8th Cir. 2002) (an individual's action, even if presumably of interest to other employees, is not in itself "concerted activity" under the Act). Because there is no evidence of a relationship between her coworkers and Geaslin's grumble to Jackson in March 2014,[11] she did not engage in concerted activity.[12]

ii. Geaslin was not unlawfully interrogated.

The ALJ's conclusion that Geaslin was unlawfully interrogated is not supported by substantial evidence. The ALJ's interrogation finding rests on only 12 lines of testimony from Geaslin:

> Q: And where were you?
> A: I was in the Starbucks kiosk.
> Q: And what did [Pelo] say to you?

[11] The ALJ also found Geaslin engaged in concerted activity by "complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas." App. 933 at 25-26 (15 ALJD 25-26). The ALJ did not cite any portion of the record in support for this conclusion. Nor could she; no evidence was presented that Geaslin complained to Panzarella regarding completing her work duties at Starbucks. Instead, Geaslin's testimony was limited to her alleged complaints to Jackson. App. 52:21-25.

[12] Because Geaslin did not assert a contract right in March 2014, *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966) does not apply.

A: She said that she wasn't going to ask me, but did I really complain to the Union about having to do bakery's products.
Q: And what was your response to her?
A: I told her, "That's not true. I did not complain to the Union about that."
Q: And what did she say?
A: She said, "Well, that's not the truth. You did complain to them and I don't like that."
Q: Was that the end of the discussion?
A: It was.

App. 53:10-22.

This Circuit applies the five-factor test set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), to determine whether an unlawful interrogation occurred. *Perdue Farms, Inc., v. N.L.R.B.*, 144 F.3d 830, 835 (D.C. Cir. 1998). Those factors include (1) whether there is a history of employer hostility, (2) the nature of the information sought, (3) identity of the questioner, (4) place of the alleged interrogation, and (5) truthfulness of the reply. *Id.* Those factors weigh against finding Geaslin was interrogated.

King Soopers and the Union have had a productive bargaining relationship for more than forty years. App. 300:22-301:1. The only alleged question from Pelo was whether Geaslin "complain[ed] to the Union about having to do bakery's products." App. 53:13-14. That question does not suggest Pelo was seeking information upon which to take action against Geaslin. Later in the conversation, Pelo expressed her opinion that Geaslin was being untruthful in her response. If Pelo was looking for a basis upon which to discipline Geaslin, she could have done

so for untruthfulness. The conversation also did not occur in an atmosphere of unnatural formality; rather, Pelo casually asked Geaslin the question while they were working on the floor.[13] Finally, Geaslin's reply to Pelo was untruthful. Geaslin admitted she did complain to the Union. App. 88:21-89:5. Thus, Geaslin lied when she told Pelo she did not do so.[14] App. 53:16-17.

Even the ALJ implicitly recognized Pelo's alleged conversation with Geaslin was not coercive when she noted that Pelo's question was "perhaps rhetorical[]." App. 935 at 46 (17 ALJD 46). *See Guardian Indus. Corp.*, 313 NLRB 1275, 1277 (1994) (rhetorical question not an unlawful interrogation); *M. Oneil Co.*, 211 NLRB 150 (1974) (finding no interrogation and stating, "the instances of interrogation were rather limited, usually being confined to a single question and, in some instances, those questions appear to have been largely rhetorical in nature.").

[13] Although Pelo is a Store Manager, applying the evidence introduced at trial to the remaining factors makes it clear there is no factual basis to find Pelo interrogated Geaslin.

[14] Indeed, Geaslin's untruthful response may explain Pelo's alleged statement that she "[did not] like" Geaslin's behavior. App. 53:18-19. It is logical for Pelo to respond to Geaslin's apparent dishonesty by stating she did not like that behavior. Regardless, Pelo's intent by the statement and Geaslin's interpretation of Pelo's statement are unknown because the GC did not solicit any evidence on this point. As such, any determination as to what Pelo meant by this statement is mere speculation.

Ultimately, Pelo's alleged "interrogation" occurred on one single occasion, and the GC entered no evidence of any past instances of interrogation at King Soopers or by Pelo. A single occurrence in which Pelo did not suggest she would take action against Geaslin and that was never mentioned again cannot form the basis for an interrogation finding. *See Chauffeurs, Teamsters & Helpers, Local 633 of N.H. v. NLRB*, 509 F.2d 490, 495 (D.C. Cir. 1974) ("Surely, an isolated and limited set of questions would not rise to the level of employer 'coercion'.") (internal footnote omitted); *Groendyke Transp., Inc. v. NLRB*, 530 F.2d 137, 144 (10th Cir. 1976) ("isolated, innocuous incidents of interrogation and unrelated conversations lacking the indicia of coercion" are insufficient to find an interrogation).

G. The Board's Finding That King Soopers Discriminatorily Twice Suspended and Terminated Geaslin Should Be Set Aside. [15]

The Board affirmed the ALJ's conclusion that Geaslin engaged in protected concerted activity on both May 9 and May 14, 2014. App. 1214-1215 (BDD at pp. 2-3).

[15] The board summarily agreed with the ALJ that Geaslin engaged in protected concerted activity on May 14, 2014 and concluded in a single sentence that Geaslin did not lose the protection of the Act on May 9 or 14 under *Atlantic Steel Co.*, 245 NLRB 814 (1979). App. 1215 (BDD at p. 3). Because of the ALJ's unsupportable credibility determinations discussed above, her conclusion regarding whether Geaslin lost protection of the Act under *Atlantic Steel* must also be set-aside.

i. Geaslin did not engage in protected concerted activity on May 9, 2014.

a. Geaslin did not have an honest and reasonable belief she was asserting a contract right.

Relying exclusively[16] on the *Interboro* doctrine, the Board agreed with the ALJ that Geaslin engaged in concerted activity on May 9, 2014. App. 1214 (BDD at p. 2). The *Interboro* doctrine recognizes as concerted activity an individual employee's invocation of a right provided for in her collective-bargaining agreement. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 841 (1984). The employee's statement or action must be "based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement" and must be "reasonably directed toward the enforcement of a collectively bargained right." *Id.* at 837.

According to the Board, after Pelo asked for help over the intercom on May 9, 2014, Geaslin approached Pelo and "asked whether she should be performing these duties because she belonged to a different bargaining unit or union." App. 1213 (BDD at p. 1); App. 934 at 9-12 (16 ALJD 9-12). Based on that question alone, the Board found Geaslin satisfied the *Interboro* doctrine because "it was consistent with her union representative's interpretation of the

[16] The Board's strict reliance on the *Interboro* doctrine appears to be a concession that Geaslin did not engage in concerted activity vis-à-vis group action. As such, only the issue of whether Geaslin engaged in concerted activity by invoking a contract right is addressed herein.

agreements, the assistant deli manager's testimony that it was unusual for employees outside the retail unit to bag groceries, and Pelo's own admission that Geaslin's duties did not include bagging groceries." App. 1214 (BDD at p. 2). The Board's analysis misses the point.[17]

The Board's finding that Geaslin had an honest and reasonable belief she was not required to sack is not supported by substantial evidence. App. 1214 (BDD at p. 2). Geaslin testified that she knew she was required to bag groceries because of King Soopers' "Customer First" program. App. 121:7-25. It is also undisputed that in March 2014 Geaslin initially refused Panzarella's directive to sample bakery products, a job ordinarily performed by the Bakery Department. App. 922 at 14-18 (4 ALJD 14-18); App. 234:18-235:17; 252:4-13. Geaslin complained to Jackson that Panzarella's request violated the CBA. *Id*. In response to Geaslin's complaint, Jackson told Geaslin that Panzarella's work order did not violate the contract and, in any event, Geaslin was required to follow her supervisor's instructions.[18] *Id*. Because Geaslin was specifically told by Jackson just *two months prior* that she was required to help other departments, she could

[17] Geaslin's *question* about whether she is permitted under the contract to sack is not the *assertion* of a contract right. App. 1040-1041 (Exceptions Brief, pp. 36-37).

[18] The Union did not file a grievance challenging Panzarella's March 2014 work assignment, App. 235:23-236:4, which is further evidence that it did not violate the CBA and it put Geaslin on notice that her complaint had no merit and was not reasonably grounded in the CBA.

not have had an honest and reasonable belief Pelo's May 9, 2014 directive violated the CBA.

The Board also ignored undisputed evidence that Geaslin knew she was required to follow Pelo's instructions due to her prior experience as an Assistant Bakery Manager at Jamboree Foods. App. 138:24-139:3. As Geaslin admitted, in that role she disciplined and terminated employees for being insubordinate and failing to follow her work orders. *Id.*

The Board's reliance on Geaslin's strict job duties and finding that it was unusual for employees outside the retail unit to bag groceries ignores undisputed evidence. All witnesses other than Geaslin testified it is commonplace for employees to help other departments. App. 223:16-21; 224:12-16; 231:9-17; 256:13-15; 257:6-15; 282:14-283:1. Even Geaslin's Union Steward, Jackson, told her she had to help other departments when instructed to do so by her supervisor. App. 235:11-17; 252:4-13. According to Geaslin, the Union's Executive Committee also agreed she was required to follow Pelo's work instruction. App. 143:17-22; 146:5-9. Moreover, as noted above, Geaslin specifically testified she was aware she was required to help pursuant to King Soopers' "Customer First" program. App. 121:7-25. The Board's disregard of the undisputed evidence is inexplicable.

Geaslin's refusal to sack groceries is similar to a driver's refusal to drive a truck in *ABF Freight Sys.*, 271 NLRB 35 (1984).[19] In that case, the claimant/driver had a history of refusing to drive trucks assigned to him. The truck assigned to him on the day of his discharge had been inspected and cleared by mechanics, yet he still refused to drive it. 271 NLRB at 36. The only basis for the driver's complaint was his opinion. *Id.* The Board concluded the driver did not possess a good faith belief that the truck presented a hazard to himself or others. *Id.*

Similarly, Geaslin has a history of refusing to perform her supervisors' work orders. Geaslin was informed by Union Steward Jackson in March 2014 that helping other departments did not violate the contract, yet she still refused to sack groceries on May 9, 2014. Geaslin gave no reason for her alleged belief that she was not required to sack, and her refusal is unsupported by the CBA. Geaslin's opinion, standing alone, is insufficient to meet the "reasonable and honest belief" requirement.

Employees must have *some* basis for their opinion that the directed action violates the contract. An employee cannot baldly claim the conduct is precluded by the contract. *ABF Freight*, 271 NLRB at 36 ("Obstructively raising petty and/or unfounded complaints" does not meet the "reasonable and honest" belief

[19] The Board rubber stamped the ALJ's attempt to distinguish *ABF Freight* without analysis. As noted in King Soopers' Exceptions, ALJ's attempt to distinguish *ABF Freight* was founded on the ALJ's mischaracterization of the testimony. App. 1043, n. 31 (Exceptions Brief, p. 39, n. 31).

requirements). Otherwise, anytime employees wish to be excused from performing a task, they will just claim it violates their collective bargaining agreement and, if the Board's Decision is adopted, those employees will be cloaked in immunity from discipline for refusing to perform the assignment.[20]

The Board's conclusion that Geaslin's interpretation of the CBA was consistent with her union representative's interpretation also ignores undisputed evidence. The Union representative in question, Craine, testified there was no "language, in any agreement, that says Starbucks employees . . . cannot bag groceries."[21] App. 195:22-25. Similarly, Geaslin pointed to no provision in the CBA that supports her refusal to sack groceries. The foundation of the *Interboro* doctrine is based on a "right rooted in a collective-bargaining agreement." *City Disposal*, 465 U.S. at 831-32, 839 (relying on specific provisions in the agreement to find the employee's objection was honest and reasonable); *see also* App. 1222-1223 (BDD at pp. 10-11), Miscimarra Dissent (noting that the Supreme Court's

[20] Contrary to the Board's finding, permitting only mistakes about fact under the *Interboro* doctrine would not require employees "to be virtual legal experts." App. 1214-1215 (BDD at pp. 2-3). Rather, it ensures employees have *some* good faith basis in the contract to support their objection and prevents employees from baldly asserting erroneous "contract rights" as an effort to avoid performing work assignments.

[21] Similarly, as Member Miscimarra notes in his dissent, "there is nothing in the CBA that would prevent a Starbucks barista from performing incidental bagging duties" and "Article 7 Section 26 of the CBA provides that "employees may perform incidental work in another classification without violation this agreement." App. 1222-1223 (BDD at pp. 10-11).

premise for the *Interboro* doctrine was "the actual existence of the right 'grounded in the collective-bargaining agreement.'"). Because Geaslin's contract undisputedly contained no provision prohibiting her from sacking groceries, Geaslin's question was not "rooted in a collective-bargaining agreement" and she did not engage in concerted activity.

b. Geaslin lost the protection of the Act on May 9 because she violated the CBA.

When Geaslin violated the CBA on May 9, 2014, she lost the Act's protection. The ALJ, however, summarily rejected that argument, App. 938, n. 27 (20 ALJD n. 27), and the Board failed to consider the issue. The Board's Decision, therefore, is not entitled to deference and must be set aside. *See Sutter*, 687 F.3d at 437.

The Board ignored its "long-recognized rule [] that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must 'obey now; grieve later.'" *In Re Mead Corp.*, 331 NLRB 509, 513 (2000) (citing *Specialized Distribution Mgmt.*, 318 NLRB 158 (1995)). "In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

The CBA prohibits employees from engaging in a "strike, picketing, boycotting, stoppage of work, anti-company publicity or other economic action of

whatsoever nature, against the Company." App. 380 (Jt. Ex. 1, Article 49, Section 120); App. 493 (Jt. Ex. 2, Article 44, Section 121). On May 9, 2014, Geaslin refused Pelo's work order and objected to Pelo's requests that she help sack groceries. Geaslin was required to follow Pelo's work order and then file a grievance if she believed Pelo's directive violated the CBA. *See In Re Mead Corp., supra*. Because Geaslin chose to engage in self-help and insubordination rather than the CBA-approved process, Geaslin's conduct was not protected by the Act and her termination did not violate the Act.[22] *See Hayes Coal Co., Inc.*, 197 NLRB 1162, 1164 (1972) (holding that strikers were obligated to follow the dispute procedure and the company's discharge of the employees did not violate the Act).

ii. Geaslin did not engage in protected concerted activity on May 14, 2014.

The ALJ concluded Geaslin engaged in protected concerted activity on May 14, 2014 in a single paragraph consisting of four sentences. App. 934 at 31-37 (16 ALJD 31-37). Therein, the ALJ found Geaslin's conduct constituted concerted activity because she allegedly continued to assert her contractual rights during the May 14, 2014 meeting, and because that meeting was a "grievance

[22] Although, as described above, the ALJ's credibility determinations should be set aside, regardless of which version of events is adopted, Geaslin's conduct amounts to a refusal to sack groceries and an active objection to her supervisor's authority. Indeed, Geaslin refused Pelo's three separate work instructions for several minutes. *See* App. 1034-1037 (Exceptions Brief at pp. 30-33).

meeting." The Board did not evaluate King Soopers' Exceptions on the matter and simply rubber stamped the ALJ's conclusion. *See* App. 1214 (BDD at p. 2). The Board's unsupported approval is entitled no deference. *See United Food*, 880 F.2d at 1439.

The Board's holding should also be set aside because it is not supported by substantial evidence. The ALJ's conclusion that Geaslin "continued to assert her contractual rights" is erroneous on its face. According to the ALJ, Pelo began the May 14 meeting by talking to Craine about Geaslin's May 9 conduct, but it quickly devolved into a heated discussion regarding what Pelo perceived as Geaslin's disrespectful and aggressive demeanor. *See* App. 925 at 28-32 (7 ALJD 28-32); App. 926 at 1-17 (8 ALJD 1-17). Geaslin could not have "continued to assert her contractual rights" on May 14 because Geaslin and Pelo did not discuss whether Geaslin was required to sack groceries under the CBA during that meeting.

To the extent the May 9 incident was discussed, Geaslin claimed only that she had not refused to sack groceries. App. 925 at 25-28 (7 ALJD 25-28). Geaslin and Pelo's discussion on May 14, therefore, centered on (1) whether Geaslin refused to sack groceries on May 9 and (2) her demeanor during the May 14 meeting, not the substance of the CBA.

The ALJ's conclusion that Geaslin's conduct on May 14, 2014 was concerted because that meeting was a "grievance meeting," and Member

Miscimarra's concurrence[23] on this point, are also unsupported. *See* App. 1224 (BDD at p. 12); App. 934 at 33-35 (16 ALJD 33-35). As Member Miscimarra correctly noted in his concurrence, the "first step" in the grievance procedure of the CBA is for King Soopers and the Union to meet to try and settle the dispute. App. 1224 (BDD at p. 12); App. 378-379 (Jt. Ex. 1, Article 48, pp. 49-50).

The May 14, 2014 meeting, however, was not scheduled as part of the grievance process; rather, it was scheduled by Pelo and Geaslin to discuss Geaslin's behavior on May 9, 2014.[24] Even Geaslin testified that the purpose of the meeting was "to let [her] know what was going on, if [she] was going to be put back to work or fired." App. 114:23-115:4. Craine did not attend the May 14 meeting to challenge any discipline or to discuss Geaslin's May 9 discipline. Rather, Craine attended the meeting at Geaslin's request and because he expected Geaslin to be terminated for her conduct on May 9. App. 115:5-10; 189:4-7. As such, the May 14 meeting was an opportunity for Geaslin to explain her May 9

[23] The Board majority did not consider whether the May 14, 2014 meeting was a "grievance meeting." In his concurrence, Member Miscimarra found the May 14 meeting was "sufficiently grounded in Article 48 of the CBA to constitute a grievance meeting under the CBA." App. 1224 (BDD at p. 12).

[24] The implication of the language in the CBA is that the Step 1 meeting will be scheduled between the Union and King Soopers. App. 378-379 (Jt. Ex. 1, Article 48, pp. 49-50). Thus, the fact that the May 14, 2014 meeting was scheduled by Pelo and Geaslin without the Union's input, further undermines the conclusion that it was not a "grievance meeting" under the CBA.

behavior and, as such, does not receive the Act's protection.[25] *See Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 865 F.2d 1283 (D.C. Cir. 1989) (preliminary meeting between employee and supervisors to give employee a chance to contest allegations of sexual harassment did not constitute a grievance meeting).

Moreover, the Step One meeting actually occurred on May 21, 2014 when Craine spoke directly with Pelo about the incidents on May 9, 14, and 21, Geaslin's discipline, and his request that Pelo give Geaslin another chance. App. 173:2-174:8; *see also* App. 800 (Er. Ex. 4). Because the Step 1 meeting occurred on May 21, the Board's conclusion that the May 14 meeting was an Article 48 "grievance meeting" is unsupported.

iii. Geaslin was not disciplined because she engaged in protected concerted activity.

Assuming *arguendo* that Geaslin engaged in protected concerted activity on May 9 and 14, King Soopers nonetheless did not violate the Act because it did not terminate Geaslin because of that activity. Neither the ALJ nor the Board

[25] Meetings between an employee, supervisor, and union representative do not automatically receive the protection of the Act. Otherwise, anytime those individuals meet to discuss an employee's performance, the employee would be cloaked in the protections of the Act and would be effectively immune from discipline. The relevant question is whether Geaslin engaged in protected concerted conduct during the May 14 meeting that warrants the protection of the Act. Because Geaslin did not engage in concerted activity during that meeting, she does not receive the Act's protection.

considered whether King Soopers' discharge of Geaslin was lawful under *Burnup & Sims*, 379 U.S. 21 (1964). That failure alone necessitates reversal. In *Sutter*, a panel of this Court stated the following:

> Perhaps out of concern that the ALJ's *Wright Line* analysis was defective, the Board made a terse statement that *Burnup & Sims* analysis would also support the ALJ's conclusion. Such a bare statement simply cannot survive judicial scrutiny. . . . Here, the Board did not explain its reasoning when it noted—almost in passing—that *Burnup & Sims* analysis would sustain the ALJ's conclusions. The ALJ explicitly refused to apply *Burnup & Sims* to the water incident and did not mention it with regard to the other incidents. The Board does not meet its analytical burden by simply stating that application of *Burnup & Sims* would reach the same conclusion without providing any analysis or explanation. . . . Regardless, the Board did not properly apply any test at all.

687 F.3d at 436-37 (internal citations to the record omitted). Because neither the Board nor the ALJ considered whether *Burnup & Sims* applies, the Board's decision must be set aside.

A proper application of *Burnup & Sims* results in a different outcome. Under *Burnup & Sims*, "[Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact,

guilty of that misconduct."[26] 379 U.S. at 23; *see also Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB 122, 124-25 (2009).

Pelo had an honest belief Geaslin engaged in misconduct on May 9 and 14, 2014. Regardless of whether Geaslin specifically said she would not help sack groceries, her conduct proves she refused to help. Despite Pelo's three separate statements that Geaslin needed to help sack, it is undisputed that Geaslin *did not* enter the check stands and *did not* help. App. 923 at 10-29 (5 ALJD 10-29); *see* App. 1035-1036 (Exceptions Brief, pp. 31-32). Even the ALJ found Geaslin likely initially refused to sack. App. 937 at 25-30 (19 ALJD 25-30). It cannot be disputed that Pelo had an honest belief Geaslin engaged in misconduct by refusing to sack on May 9 when Geaslin questioned, objected, and refused to perform Pelo's work order.

Pelo's honest belief that Geaslin engaged in misconduct can also be seen from Pelo's repeated assertions during the May 9 and 14 meetings that Geaslin refused to sack. App. 927 at 12-13 (9 ALJD 12-13); App. 937 at 14-16 (19 ALJD 14-16). Because Pelo repeatedly stated Geaslin engaged in misconduct and,

[26] The Court's analysis of the *Burnup & Sims* requirements is analogous to retaliation claims in other areas of employment law. In Title VII retaliation claims, the plaintiff must show she would not have suffered the adverse employment action but-for her protected activity. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). Here, because the GC has not proved any causal link between Geaslin's alleged protected concerted activity and her adverse employment action, the Board's Decision must be set aside.

indeed, Pelo and Geaslin argued on May 9 and 14 over whether Geaslin refused to sack, there can be no doubt Pelo honestly believed Geaslin engaged in misconduct.

Nor can there be doubt that Pelo honestly believed Geaslin engaged in misconduct on May 14, 2014. Pelo testified that she interpreted Geaslin's conduct to be aggressive and disrespectful, and Pelo repeatedly told her so during the meeting. App. 925 at 29-32 (7 ALJD 29-32); App. 1051-1054, (Exceptions Brief, pp. 47-50).

The ALJ's factual findings also support the conclusion that Pelo had an honest belief Geaslin engaged in misconduct on May 14. The ALJ found Geaslin raised her voice, argued with Pelo, and interrupted Pelo. App. 926 at 2-3 (8 ALJD 2-3). Moreover, the ALJ credited Craine's testimony that Geaslin became more agitated and "aggressive" during the meeting. App. 926 at 5-6 (8 ALJD 5-6). To be sure, Craine, who the ALJ found to be credible, thought Geaslin's behavior was so out of control that he stopped the meeting and took Geaslin into the hallway to calm her down. App. 290:6-10. Craine stated Geaslin's demeanor was inappropriate and it is why he took her out of the room during that meeting. App. 191:1-8; 192:6-8. While out of the room, Craine specifically told Geaslin to give Pelo more respect and not to raise her voice. App. 926 at 12-13 (8 ALJD 12-13). Thus, Pelo's belief Geaslin engaged in misconduct is supported by Craine's testimony and the ALJ's findings of fact.

In contrast, neither the ALJ nor the Board concluded—and the GC did not prove by a preponderance of the evidence—that Geaslin did not engage in misconduct. *See also Akal*, 354 NLRB at 124-25. According to the ALJ, on May 9, 2014, Geaslin initially refused to sack groceries and did not make any effort to follow Pelo's work order until the very end of her discussion with Pelo. App. 937 at 25-30 (19 ALJD 25-30). Geaslin's initial refusal to perform the work assignment is a violation of the CBA, regardless of any subsequent compliance.

Further, the ALJ found Geaslin engaged in several forms of misconduct during the May 14 meeting by her inappropriate and unprofessional behavior. App. 926 at 2-13 (8 ALJD 2-13). The ALJ even found that an employee's failure to behave in a professional manner violates King Soopers' policies and procedures and constitutes misconduct. App. 921 at 1-10 (3 ALJD 1-10). Craine also admitted Geaslin engaged in misconduct when, following her termination on May 21, 2014, he asked Pelo to give Geaslin "another chance" and stated he did not "see any more issues with any type of misconduct coming up in the future." App. 173:23-174:10. There would be no reason for "another chance" if Geaslin did not commit any policy violations.

The Board is not permitted to supplant its judgment for that of King Soopers. A panel of this Court aptly explained:

> The Board does not have authority to regulate all behavior in the workplace and it cannot function as a ubiquitous "personnel

> manager," supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer. It is well-recognized that an employer is free to lawfully run its business as it pleases. This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason. Although the Board has considerable leeway in determining the exact scope of protected activity, it has no authority to extend the protections of the Act to plainly insubordinate behavior unrelated to the terms and conditions of employment.

Epilepsy Found. of Ne. Ohio v. N.L.R.B., 268 F.3d 1095, 1105 (D.C. Cir. 2001) (internal citations omitted). Because Geaslin engaged in misconduct on both May 9 and 14, 2014, the Board's Decision must be set aside.

H. The Board Erred by Expanding the Act's Remedies.

Traditionally, the Board has awarded search-for-work related expenses as a setoff from interim earnings, which in turn are subtracted from gross backpay. *See* App. 1224 (BDD at p. 12). In its Decision, however, the Board departed from this nearly eight-decade-long approach and expanded the Act's remedies to include search-for-work and interim employment expenses regardless of whether those expenses exceed a discriminatee's interim earnings. App. 1221 (BDD at p. 9). That expansion must be reversed.

i. There is no change in circumstances warranting a departure from the Board's well-established precedent.

For nearly eight decades, the Board has declined to award search-for-work and other work-related expenses independent from interim earnings. *See e.g.*, *D.L. Baker, Inc.* 351 NLRB 515, 537, 351 (2007); *Aircraft & Helicopter Leasing*,

227 NLRB 644, 645 (1976) ("The law is settled that transportation expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination, and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings."); *Crossett Lumber Co.*, 8 NLRB 440, 479-480 (1938).

The Board provides no basis to depart from this well-settled law. Rather, the Board simply concludes that the current remedial framework fails to make discriminatees truly whole. App. 1217 (BDD at p. 5). To the extent the traditional approach has failed to make employees whole, it has done so for eight decades and the Board must provide a reasoned justification from departing from its well-established precedent. *See Pittsburgh Press*, 977 F.2d at 655 (D.C. Cir. 1992). The Board has failed to do so.

The language of the Act is the same as it was nearly eight decades ago when the Board first held that search-for-work and other work-related expenses are to be tied to a discriminatee's interim earnings. Without a change in the Act or circumstances, there is no legitimate reason to change the Board's well-established law on this issue.[27] *See Austin Fire Equip., LLC* 360 NLRB No. 131 slip op. at 5

[27] There is even less of a change of circumstances warranting a modification to the Board's traditional approach considering most jobs are applied for online or via telephone and, as such, there should be no search-for-work expenses. *See Int'l Bhd. of Teamsters, Local 71*, 2014 WL 4809567 (N.L.R.B. Division of Judges)

n. 14 (June 25, 2014) (Board may overrule precedent "to account for changed circumstances or experience applying the law, or to bring the Board's precedent more in line with that of reviewing courts."); *see also Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 slip op. at 15 (Aug. 27, 2015) (revisiting joint employer standard because of the change in workplace employment relationships and the increase of the "procurement of employees through staffing and subcontracting arrangements"). Because the Act remains the same today as it was when the traditional approach was established, there is no basis to modify the Board's award of interim earnings. The Board made a policy decision nearly eight decades ago regarding the award of search-for-work expenses. Absent a statutory basis to overturn those decisions, the Board's well-settled refusal to award those damages should not be disturbed.

ii. The Board's expansion of the Act's remedies exceeds its authority.[28]

The Board has only those powers specifically granted to it by Congress. *HTH Corp. v. NLRB.*, 823 F.3d 668, 679 (D.C. Cir. 2016). "The Supreme Court has consistently invalidated Board orders that are not directly related to the

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(Sept. 26, 2014) (noting that telephone and internet make it possible to conduct a job search at no extra expense).

[28] As discussed in greater detail in King Soopers' Supplemental Brief, the Board's expansion of the Act's remedies also contravenes Section 10(c) because it amounts to an award of general compensatory damages. App. 1133-1136 (Supplemental Brief, pp. 7-10).

effectuation of the purposes of the Act or are punitive." *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805 (D.C. Cir. 1997). Rather, the Board's authority is strictly limited to measures that are remedial. *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 235-236 (1938); *see also Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997). The Board's expansion of the Act's remedies provides discriminatees a windfall and is punitive to respondents.[29]

The GC justified the belated "enhanced remedy" amendment by opining King Soopers "wreaked havoc" on Geaslin's life. App. 763-764 (GC Ex. 1 (hh), pp. 2-3). That purpose places it beyond the scope of remedies permitted by the Act. There is no need for an "enhanced remedy" if it were part of the Act's remedial scheme. Compensation for "wreaking havoc" on an employee's life is not remedial. It is punitive and, thus, prohibited.

To support the expansion, the Board stated that "under the Board's traditional approach, discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed." App. 1217 (BDD at p. 5). The Board, however, ignores the other side of the coin: if an employee may be reimbursed for all search-for-

[29] Importantly, because the Board lacks authority to award search-for-work expenses without regard for a discriminatee's search-for-work efforts in any circumstance, the Board's decision to expand the Act here is entitled no deference. *See Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1089 (D.C. Cir. 2016).

work expenses regardless of their interim earnings, then the employee is incentivized to search for a new position in a new state or location in which she would rather live, or in a new industry for which she needs entirely new training. The employee is even incentivized to seek positions for which she is not qualified because, after all, it is the employer who must bear the burden of those expenses. Indeed, under the Board's new approach, there is nothing to prevent a discharged employee from traveling across the country to apply for positions she has no reasonable likelihood of getting, and then recovering an award for those "search-for-work" expenses. There would similarly be nothing to prevent a discharged employee from accepting interim employment in a high-priced housing market and claiming the increased housing costs are work-related expenses.[30] Indeed, by extracting an employee's search-for-work efforts from his or her earnings, it is the discriminatee who has complete control over the expenses incurred and who will receive a windfall at the employer's expense.

On the other hand, if the current remedial structure continues and an employee's recovery of search-for-work expenses is linked to her interim earnings, then the employee is more likely to focus her job search efforts on locations and jobs in which the employee is qualified. Offsetting a discharged employee's

[30] King Soopers outlined other examples of a discharged employee's potential abuse in its Supplemental Brief. App. 1147, n. 9 (Supplemental Brief, p. 21, n. 9).

search-for-work expenses against her interim earnings is fair and consistent with the Act's remedial provisions. [31]

As Member Miscimarra noted in his dissent, a windfall will result to employees who have interim earnings that equal or exceed the sum of their lost earnings and their search-for-work expenses. App. 1225 (BDD at p. 13). That windfall, he continued, could easily be remedied by limiting the award of search-for-work expenses if the claimant's interim earnings equaled or exceeded their lost earnings and expenses. App. 1226 (BDD at p. 14). The Board's Decision, however, establishes no such limitation. The Board chose to ignore the flaw in its expanded remedial scheme in favor of awarding employees a windfall.[32]

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[31] Had the ALJ not prohibited evidence rebutting the GC's allegation that King Soopers "wreaked havoc" on Geaslin's life, King Soopers would have introduced evidence that in the retail grocery industry in Denver employees can effectively mitigate because they often switch employment among competitors. Moreover, the ALJ precluded the GC's enhanced remedy request from being fully litigated. As such, this is an inappropriate case for which to extend the Act's remedies. *See* App. 1140-1143 (Supplemental Brief, pp. 14-17).

[32] The Board analogizes a discriminatee's search-for-work expenses to medical expenses and retirement fund contributions. App. 1218 (BDD at p. 6). The difference between these types of expenses, however, highlights the error in the Board's reasoning. Medical expenses, like retirement fund contributions, are not subject to the same abuse and policing obstacles as search-for-work expenses. Medical expenses are definitive, objective, and verifiable. Thus, by their very nature they are dissimilar from search-for-work and other work-related expenses, which are varied and unverifiable. Moreover, employees have complete control over the amount of search-for-work expenses they incur and may use an employer's liability for those expenses to shift the risk of moving locations or changing industries to their former employer.

An award that grants employees a windfall is not an appropriate remedial order. *See Starcon Int'l v. NLRB*, 450 F.3d 276, 277-78 (7th Cir. 2006) (Posner, J.) *enforcing Starcon, Inc.*, 344 NLRB 1022 (2005) ("The National Labor Relations Act is not a penal statute, and windfall remedies-remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong-are penal."). "The Board therefore may not 'apply a remedy it has worked out on the basis of experience, without regard to circumstances which may make its application *to a particular situation* oppressive.'" *Komatz Const., Inc. v. NLRB*, 458 F.2d 317, 324-25 (8th Cir. 1972) (quoting *NLRB v. Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 349 (1953)) (emphasis added). Because the Board's expansion of the Act's remedies will result in a windfall for employees, it is not an appropriate remedial order and must be set aside.

The Board casually casts aside the fact of a windfall, replying "this fact would not cause us to reject it" because "such a circumstance would constitute a permissible remedial outcome if it bears an appropriate relation to the policies of the Act." App. 1219 (BDD at p. 7) (internal quotation marks omitted). Granting a windfall to employees, however, can never bear "an appropriate relation to the policies of the Act" because it exceeds the scope of the remedial authority of the Act, which is limited to back pay and reinstatement. 29 U.S.C. § 160(c);

Unbelievable, Inc. v. NLRB, 118 F.3d 795, 804 (D.C. Cir. 1997). Indeed, the Board's disregard for the Act's limitations is exactly what the Supreme Court warned against in *Republic Steel* when it stated, "[w]e do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940). The Board's deliberate indifference to the Act's remedial limitations in favor of an approach it believes will effectuate the policies of the Act requires that the Decision be set aside.

CONCLUSION

Based on the foregoing, the Court should set aside the Board's Decision in its entirety.

Dated: December 23, 2016.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 13,000-word type-volume limitation in amended Fed. R. App. P. 32(g)(1) because the brief contains 12,176 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 31(a)(5) and the type style requirements of Fed. R. App. P. 31(a)(6) because the brief has been prepared proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2016, I electronically filed the foregoing **PETITIONER'S OPENING BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Linda Dreeben
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I further certify that on this 23rd day of December, 2016, I sent the required copies of the Petitioner's Opening Brief and Joint Appendix to the Clerk of the Court via overnight delivery.

s/ Mary Navrides, Legal Secretary